Filed in First Judicial District Court
1/11/2017 4:15:58 PM
Carver County, MN

STATE OF MINNESOTA
COUNTY OF CARVER

DISTRICT COURT
FIRST JUDICIAL DISTRICT
PROBATE DIVISION

In Re:

Court File No.: 10-PR-16-46

Estate of Prince Rogers Nelson,

Deceased.

AFFIDAVIT OF RANDALL W. SAYERS

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

RANDALL W. SAYERS, being first duly sworn upon oath, deposes and states as follows:

1. I am an attorney and partner at Hansen, Dordell, Bradt, Odlaug & Bradt PLLP ("Hansen Dordell") practicing in the areas of Trusts and Estates.
2. Sharon Nelson, Norrine Nelson, and John Nelson retained Hansen Dordell in November of 2016 as counsel in the above-referenced matter.
3. I have participated in all communications to-date with Steven Silton or any other attorneys with Cozen O'Connor on behalf of Hansen Dordell in which he sought similar specific information from me or my clients regarding L. Londell McMillan ("McMillan").
4. Prior to January, 6, 2017, I have never seen Exhibits A and B to the January 6, 2017, Affidavit of Thomas P. Kane, and I am not aware of any communications with Mr. Kane or his colleagues at Cozen O'Connor in which he sought similar specific information from me or my clients regarding McMillan subsequent to the Petition filed by Omarr Baker on or about December 13, 2016.

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5. Contrary to paragraph 3 in Mr. Kane's January 6, 2017 Affidavit, I have not met or conferred with "Petitioners" or their attorneys in an attempt to resolve the issues in their motion to compel. I was not advised of the motion to compel before it was served on January 6, 2017.

6. On December 5, 2016, McMillan voluntarily appeared at the offices of Cozen O'Connor. Also present in the conference room was Mr. Silton and Omarr Baker. Attorney Edward Diaz and Tyka Nelson were present by phone. Mr. Silton questioned McMillan regarding his qualifications and background for approximately three and one-half hours. Mr. Diaz asked no questions.

7. At the conclusion of the December 5, 2016, meeting McMillan agreed to provide in writing his thoughts about the benefits he could bring to the Estate. However, the next day Tyka filed her Petition requesting the appointment of Fiduciary Trust or, in the alternative, Comerica, and expressly objecting to McMillan, and I believe that McMillan properly concluded that Tyka would not seriously consider his nomination, so providing further information would be fruitless.

8. Attached as Exhibit A is a copy of e-mail correspondence dated December 20 and December 21, 2016 between McMillan and previous counsel for Tyka Nelson.

9. On January 6, 2017, I participated in the conference call with the Court wherein the Court asked all attorneys if there were any issues that needed to be addressed before the upcoming hearing on January 12, 2017. Mr. Silton was on the conference call and referenced potential witnesses, as well as issues related to the Special Administrator's accounting and discharge, but did not raise any discovery issues related to McMillan whatsoever.

10. Attached as Exhibit B is a copy of *In re Wingen's Estate*, No. A08-0944, 2009 WL 1586876 (Minn. Ct. App. June 9, 2009) pursuant to Minn. Stat. § 480A.08.

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1/11/2017 4:15:58 PM
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11. Attached as **Exhibit C** is a copy of *In re Hill's Estate*, No. A03-1775, 2004 WL 1192123 (Minn. Ct. App. June 1, 2004) pursuant to Minn. Stat. § 480A.08.

12. Attached as **Exhibit D** is a copy of *In re Gosnell's Estate*, No. A05-1879, 2006 WL 2348079 (Minn. Ct. App. Aug. 15, 2006) pursuant to Minn. Stat. § 480A.08.

FURTHER YOUR AFFIANT SAYETH NOT.

RANDALL W. SAYERS

Subscribed and sworn to before me
this 9th day of January, 2017.

Notary Public

KAREN LYNN HERBERG
Notary Public - Minnesota
My Commission Expires Jan. 31, 2020

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EXHIBIT
tabbies
A

Randall Sayers

From: Edward.Diaz@hklaw.com
Sent: Wednesday, December 21, 2016 8:43 PM
To: llm@thenorthstargroup.biz
Cc: robert.labate@hklaw.com; jorge.hernandez-torano@hklaw.com; chrysm@thenorthstargroup.biz; Randall Sayers; Edward.Diaz@hklaw.com
Subject: RE: Prince Estate & Tyka

Hi Londell, I reached out to Tyka to deliver your request. She believes there is not a need for further discussion and respectfully declines your invitation.

Eddie

Edward Diaz | Holland & Knight
Partner
Holland & Knight LLP
701 Brickell Avenue, Suite 3300 | Miami, FL 33131 Phone 305.789.7709 | Fax 305.789.7799 edward.diaz@hklaw.com | www.hklaw.com
Add to address book | View professional biography

-----Original Message-----
From: Londell McMillan [mailto:llm@thenorthstargroup.biz]
Sent: Tuesday, December 20, 2016 9:48 PM
To: Diaz, Edward (MIA - X27709) <Edward.Diaz@hklaw.com>
Cc: Labate, Robert J (CHI - X65751) <robert.labate@hklaw.com>; Hernandez-Torano, Jorge L (MIA - X27721) <jorge.hernandez-torano@hklaw.com>; <chrysm@thenorthstargroup.biz> <chrysm@thenorthstargroup.biz>; <rsayers@hansendordell.com> <rsayers@hansendordell.com>; Diaz, Edward (MIA - X27709) <Edward.Diaz@hklaw.com>
Subject: Re: Prince Estate & Tyka

Hi Eddie, I wish to ask her what went wrong with our positive relationship and how can we fix it. Thank you.
Best,
Londell

Sent from my iPhone

> On Dec 20, 2016, at 8:44 PM, <Edward.Diaz@hklaw.com> wrote:
>
> Londell, I'm not really sure what an additional call would accomplish when we previously spent 3 1/2 hours on a prior call. In that call, you were able to discuss your offerings and capabilities and we listened closely and intently.
>

Filed in First Judicial District Court
1/11/2017 4:15:58 PM
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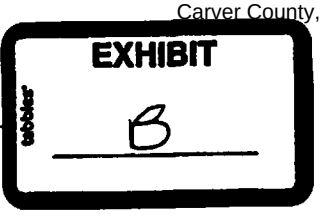
> However, I will ask Tyka if she agrees for us (and she) to speak with you again or if she would prefer that we just speak to you, or if she prefers to communicate with your surrogate. I will get back to you soon.
>
> Eddie
>
>
>
> Edward Diaz | Holland & Knight
> Partner
> Holland & Knight LLP
> 701 Brickell Avenue, Suite 3300 | Miami, FL 33131 Phone 305.789.7709 |
> Fax 305.789.7799 edward.diaz@hklaw.com | www.hklaw.com
> _____
> Add to address book | View professional biography
>
> NOTICE: This e-mail is from a law firm, Holland & Knight LLP ("H&K"), and is intended solely for the use of the individual(s) to whom it is addressed. If you believe you received this e-mail in error, please notify the sender immediately, delete the e-mail from your computer and do not copy or disclose it to anyone else. If you are not an existing client of H&K, do not construe anything in this e-mail to make you a client unless it contains a specific statement to that effect and do not disclose anything to H&K in reply that you expect it to hold in confidence. If you properly received this e-mail as a client, co-counsel or retained expert of H&K, you should maintain its contents in confidence in order to preserve the attorney-client or work product privilege that may be available to protect confidentiality.
>
>
> -----Original Message-----
> From: Londell McMillan [mailto:llm@thenorthstargroup.biz]
> Sent: Tuesday, December 20, 2016 8:39 PM
> To: Diaz, Edward (MIA - X27709) <Edward.Diaz@hklaw.com>; Labate,
> Robert J (CHI - X65751) <robert.labate@hklaw.com>; Hernandez-Torano,
> Jorge L (MIA - X27721) <jorge.hernandez-torano@hklaw.com>
> Cc: Chrystal Matthews <chrysm@thenorthstargroup.biz>; Randall Sayers
> <rsavers@hansendordell.com>
> Subject: Prince Estate & Tyka
>
> Gentlemen, I would like the opportunity to speak with you and Ms. Tyka Nelson regarding my interest to serve in the Prince Estate. I do think it would be to all parties mutual best interests and eapecially the Prince Estate if she and I had an opportunity to speak. In the alternative, I can have a surrogate speak on my behalf if refuses to even allow me the opportunity to meet and share my offerings and capabilities.
>
> Thank you very kindly. Have a good evening.
>
> Londell
>
> Sent from my iPhone



2009 WL 1586876
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

In re the ESTATE OF Erna M. WINGEN, Deceased.

No. A08-0944.
|
June 9, 2009.

West KeySummary

1 Pretrial Procedure
Actions and Proceedings in Which Remedy Is Available

Objectors to the will were entitled to conduct discovery in the probate proceeding. The 92-year-old mother died and two of her children filed objections to the probate of the will alleging undue influence, since the will disinherited two of the four children. The objectors did not have to conduct discovery in a separate action from the pending probate proceeding. 48 M.S.A., Rules Civ.Proc., Rule 37; M.S.A. § 524.3-404 (2008).

Cases that cite this headnote

Blue Earth County District Court, File No. 07-PR-07-2623.

Attorneys and Law Firms

Perry A. Berg, Keith L. Deike, Patton, Hoversten & Berg, P.A., Waseca, MN, for appellants Alonzo E. Wingen and Phillip F. Wingen.

Scott V. Kelly, Farrish Johnson Law Offices, Chtd., Mankato, MN, for respondent Kathryn S. Stencel.

Considered and decided by JOHNSON, Presiding Judge; HALBROOKS, Judge; and Ross, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge.

*1 An elderly woman died and left a will that purports to bequeath her estate to only two of her four surviving children. The two disinherited children brought a motion for court-ordered discovery relating to their allegation that the will was executed because of undue influence. The district court denied the discovery motion and probated the will. We conclude that the disinherited children should not have been prohibited from conducting discovery within the probate proceeding and, therefore, reverse and remand.

FACTS

Erna Wingen, a resident of the city of Mankato, died in July 2007 at the age of 92. She was survived by four children: Francis Wingen, Phillip Wingen, Alonzo Wingen, and Kathryn Stencel.

On August 8, 2007, Stencel filed a petition for formal probate of a will and for the appointment of herself as the personal representative of the estate. With her petition, Stencel filed the last will and testament of Ema Wingen and the first codicil to the last will and testament.[1] The will, signed in 2003, nominates Stencel to serve as personal representative, devises the majority of the estate to Stencel and Francis Wingen, and expressly makes no provision for Phillip Wingen and Alonzo Wingen.

On September 12, 2007, Phillip Wingen and Alonzo Wingen (hereinafter "the objectors") filed objections to the probate of the will and to the appointment of Stencel as personal representative. They alleged that Erna Wingen "was unduly influenced in the making of the Will by Ms. Stencel." The parties appeared for a hearing on the objections later the same month. Thereafter the objectors informally obtained from Stencel's counsel copies of

notes that he had made during conversations with Erna Wingen regarding her decision to exclude two of her children from her will. The objectors also obtained copies of Erna Wingen's prior wills. Stencel's counsel refused, however, to agree to the production of Erna Wingen's medical records and certain financial records.

A hearing on the objections was scheduled for December 13, 2007. Prior to the hearing, the objectors brought a motion for an order permitting subpoenas to be served on third parties possessing Erna Wingen's medical and financial records. According to the objectors, they sought agreement from Stencel to postpone the December 13 hearing, but Stencel refused. At the hearing, Stencel's counsel argued orally that the objectors' requests for court-ordered discovery were improper. Counsel argued that the objectors were conducting a "fishing expedition." Counsel also argued that the objectors' arguments for invalidating the will should be "frame[d] with pleadings" that state a factual basis of their claims so as to provide Stencel with "some direction ... as to where we are going." Counsel argued further that the objectors should not be permitted to conduct the sought-after discovery unless and until they commenced a separate action. In response, the objectors' counsel argued that the objectors had a right to do discovery in this action and that discovery was necessary to develop their objections.

*2 The district court was convinced by Stencel's argument. The district court noted that "obviously there hasn't been discovery served because there hasn't been any sort of action commenced." The district court also reiterated Stencel's argument by saying that, without formal pleadings stating the objections in greater detail, "we will be out there flaying around to see what they want next and when they want it." At the conclusion of the hearing, the district court warned counsel for the objectors, "you better get your lawsuit going if that is what you want to [do] because I am not inclined to grant you the relief that you are asking for [within this case].... I will issue my order in due course but ... you pretty much know what I am going to do now."

On January 10, 2008, the district court issued a two-page order concerning the objections to the probate of the will and the appointment of a personal representative. The order states that the objectors "asked this Court for an order granting limited, court supervised discovery," that there is "no basis in either law or statute for this Court to grant the relief requested," that objectors "are free to begin a formal action against Decedent's estate if they so choose," but that until such time, "this Court will not order more discovery than has already been provided."

On February 4, 2008, the district court issued an order probating the will and appointing Stencel to be the personal representative. On February 20, 2008, the objectors commenced a separate action against Stencel and Francis Wingen, alleging that Erna Wingen lacked capacity to sign her will and that Stencel and Francis Wingen caused her to sign the will under undue influence. The objectors timely appealed from the February 4 order in this action. At oral argument, counsel indicated that neither party has pursued a resolution of the separate action during the pendency of this appeal.

DECISION

The objectors argue that the district court erred by denying their motion for court-ordered discovery. In response, Stencel argues that a district court should be allowed to determine the appropriate procedures for discovery in this situation. Discovery rulings are reviewed for abuse of discretion and will not be disturbed on appeal unless the district court "exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law." *EOP-Nicollet Mall, L.L.C.* v. *County of Hennepin*, 723 N.W.2d 270, 275 (Minn.2006) (quotation omitted).

The district court denied the objectors' motion on the ground that the proposed discovery was improper in this action and would be proper only in a separate action commenced by a summons and complaint. The text of the probate code reveals that the district court's reasoning is incorrect. The code provides, "Any party to a formal proceeding who opposes the probate of a will for any reason shall state in pleadings the objections to probate of the will." Minn.Stat. § 524.3-404 (2008). "Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof." Minn.Stat. § 524.3-407 (2008). Most important for purposes of this appeal is the following provision: "Unless inconsistent with the provisions of this chapter or chapter 525, pleadings, practice, procedure and forms in all probate proceedings shall be governed insofar as practicable by [the] Rules of Civil Procedure...." Minn.Stat. § 524.1-304 (2008).

*3 Prior decisions of this court provide further support for the proposition that a party objecting to the probate of a will may conduct discovery within a probate proceeding. In *In re Estate of Smith*, 444 N.W.2d 566 (Minn.App.1989), this court held that a district court erred

by denying motions to compel discovery brought by a party objecting to probate of a will. *Id.* at 568. We applied the Minnesota Rules of Civil Procedure in that proceeding, noting that the rules "permit parties to obtain discovery of any matter relevant to the subject matter of a dispute as long as the information sought 'appears reasonably calculated to lead to the discovery of admissible evidence.' " *Id.* (quoting Minn. R. Civ. P. 26.02(a)). Similarly, in *In re Estate of McCue*, 449 N.W.2d 509 (Minn.App.1990), this court affirmed the grant of a motion to vacate an order formally probating a will, without a hearing on claims of undue influence and lack of testamentary capacity, and we stated that, upon remand, the appellant should be allowed to conduct discovery. *Id.* at 513; *see also In re Conservatorship of Smith*, 655 N.W.2d 814, 818 (Minn.App.2003) (holding that conservatorship proceedings under chapters 524 and 525 are subject to discovery portion of rules of civil procedure).

In addition, other opinions of this court indicate that a separate action is not necessary to contest a will. *See In re Estate of Sullivan*, 724 N.W.2d 532, 534 (Minn.App.2006) (considering propriety of settlement agreement in will contest initiated by objection to probate of will); *In re Estate of Torgersen*, 711 N.W.2d 545, 550 (Minn.App.2006) (reviewing merits of judgment rendered after five-day trial concerning validity of will initiated by objection to probate of will), *review denied* (Minn. June 20, 2006); *In re Estate of Evenson*, 505 N.W.2d 90, 91-92 (Minn.App.1993) (affirming award of attorney fees for defending will contest in trial following objection to probate of will).

We are aware that, at some times and in some places within the state, it has been the practice of district courts and litigants to determine a will contest in a separate action rather than in a pending probate proceeding. We are unable to identify any basis in the probate code or in the applicable caselaw for a principle of law providing that a party pursuing a will challenge must conduct discovery or must prove up the challenge in a separate action. Naturally, if there is consent to multiple actions among all parties concerned and the district court, there is no issue. If, however, persons objecting to the probate of a will seek to conduct discovery within a pending probate proceeding, they may do so within the probate proceeding pursuant to rules 26 through 37 of the rules of civil procedure.

Thus, the objectors have a right to conduct discovery in the probate proceeding, so long as the discovery sought is consistent with the rules of civil procedure. The district court's denial of the objectors' discovery motion was based on "an erroneous view of the law" and, thus, was an abuse of its discretion. *EOP-Nicollet Mall, L.L.C.*, 723 N.W.2d at 275 (quotation omitted). Accordingly, we reverse the district court's order denying the objectors' motion for discovery, reverse the order probating the will, and remand for further proceedings consistent with this opinion.

*4 Reversed and remanded.

All Citations

Not Reported in N.W.2d, 2009 WL 1586876

Footnotes

1 Stencel contends that the objectors did not object to the codicil in the district court and, thus, forfeited their challenge to the codicil. We reject the contention. The objections refer to the "Purported Will," which term is defined in the objections to include both the will and the codicil.

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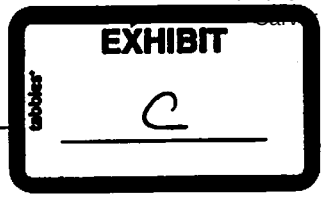

2004 WL 1192123
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

In re ESTATE OF Ernestine Terese HILL, a/k/a Ernestine C. Hill and Ernestine Hill.

No. A03-1775.
|
June 1, 2004.

St. Louis County District Court, File No. P8-02-600167.

Attorneys and Law Firms

Melanie S. Ford, Duluth, MN, for appellant.

James R. Cope, Cope & Peterson, Ltd., Virginia, MN, for respondent.

Considered and decided by HARTEN, Presiding Judge; HALBROOKS, Judge; and MINGE, Judge.

UNPUBLISHED OPINION

MINGE, Judge.

*1 Appellant argues that the district court abused its discretion by denying her request for a continuance. Because the district court had granted several continuances and because appellant failed to retain new counsel despite having ample time to do so, we affirm.

DECISION

Ernestine C. Hill died on September 17, 2001, leaving a will that nominated respondent Sharon A. Lassila as personal representative. Respondent filed a petition for formal probate of the will and for formal appointment of a personal representative on April 8, 2002. Appellant Carol J. Driscoll objected, alleging that the decedent lacked testamentary capacity and intent and that respondent engaged in fraud, undue influence, and duress to obtain decedent's assets.

The question on appeal is whether the district court abused its discretion in denying appellant's request for a continuance. We will not reverse a district court's decision to grant or deny a continuance absent a clear abuse of discretion. *Southwest Fid. State Bank* v. *Apollo Corporate Travel Inc.*, 360 N.W.2d 668, 670 (Minn.App.1985). In determining whether the district court abused its discretion, we must determine whether the decision not to continue the matter would prejudice the outcome of the proceeding. *Lanzo* v. *F. & D Motor Works*, 396 N.W.2d 631, 635 (Minn.App.1986). "[A] party must be afforded a reasonable opportunity to prepare a case." *Cotroneo v. Pilney*, 343 N.W.2d 645, 650 (Minn.1984). Nevertheless, a party requesting a continuance must have made a diligent effort to prepare for trial. *Kissner* v. *Norton*, 412 N.W .2d 354, 357-58 (Minn.App.1987); *Westbrook State Bank* v. *Anderson Land & Cattle Co.*, 364 N.W.2d 416, 420 (Minn.App.1985).

Here, appellant filed her objection to the appointment of respondent as personal representative and to the formal probate of the will on April 19, 2002. The matter was set for pre-trial on June 6, 2002. At that time, appellant was represented by counsel. Hearings on the matter were continued on June 6, August 1, September 11, and November 25, 2002, and January 2 and February 21, 2003. The majority of these continuances were a result of requests made by counsel for both parties for more time to conduct discovery. The January 2 continuance was the result of appellant hiring a second attorney who needed time to become familiar with the case. Following this series of continuances, the district court set the hearing date for April 3, 2003.

At the April 2003 hearing, neither appellant nor her counsel appeared in court, respondent's attorney notified the court that one of appellant's attorneys had indicated that he would be withdrawing from the case, and trial on the matter was set for four months later. Appellant's attorneys notified the district court of their individual withdrawals on April 8 and 11, 2003.

The parties next appeared before the court on August 7, 2003, for a hearing on respondent's motion for summary judgment. Appellant appeared without counsel and requested another continuance so that she could hire an

attorney and conduct further discovery. The district court denied her request, noting that the matter was nearly a year and a half old, that there had been several continuances, and that the court had given appellant four months since the April 2003 hearing to hire counsel and conduct further discovery. The district court also denied respondent's summary judgment motion and instructed the parties that the trial would occur as scheduled four days later.

*2 On the trial date, appellant appeared without counsel and requested more time from the court, stating that she had hired an attorney who agreed to represent her, but that the attorney was not familiar with the case and had a scheduling conflict with that day's hearing. The district court denied appellant's motion for a continuance and gave her an opportunity to testify and to enter into the record any other evidence she wished. Appellant declined to testify and did not present any other evidence to support her objection.

Respondent renewed her motion for summary judgment and, in the alternative, moved for a directed verdict. Because appellant had not provided the court with any additional evidence since filing her objection a year and a half earlier, the district court granted respondent's motion, noting that appellant had failed to meet her burden of proof. In its order, the district court found that appellant had not been diligent in seeking discovery and noted that appellant "has retained two lawyers and assured the Court that a third firm was being retained. No counsel has appeared or contacted the Court since the last withdrawal."

Appellant argues that she was prejudiced because she should have been afforded a reasonable opportunity to prepare her case as a pro se litigant. The pro se claim is not credible. In the year and a half that passed from the filing of her objection, appellant had legal counsel for all but four months and there is no indication that she ever intended to proceed pro se. Instead, the record shows that appellant was requesting a further continuance to accommodate her third counsel, who was never identified and was not retained until nearly four months after her original attorneys withdrew.

Appellant further argues that she was prejudiced because the district court failed to give her latitude and explain the law pertinent to her case. But the record shows that at the August 7 hearing, the district court addressed appellant's reluctance to offer testimony. When appellant stated that she did not know what to say to oppose the summary judgment motion because she did not know what the court would accept as legal argument, the court stated, "[y]ou can say what you think, and then I'll make a decision as to whether to grant the motion or not grant the motion.... If you oppose [the motion for summary judgment], I'll hear what you have to say." Further, after appellant expressed concern as to what evidence might be considered hearsay at trial, the district court instructed her that it would decide what was hearsay and afforded appellant the opportunity to testify or provide whatever evidence she had. Appellant declined to offer any evidence.

Appellant had a year and a half since she filed her objection to make diligent efforts to prepare her case. But appellant failed to assemble evidence or conduct discovery, despite being represented by counsel for all but the last four months of that time period. Appellant offers no reason as to why discovery was not conducted prior to the withdrawal of her attorneys in April or why she also failed to respond to respondent's interrogatories and discovery requests. Although appellant was clearly prejudiced by the final denial of her request for a continuance, the record shows that she was given more than ample time to obtain counsel and prepare her case. There exists a substantial basis for the district court to conclude that she failed to act in a diligent manner. Based on the record before us, the district court's refusal to grant an additional continuance was not an abuse of discretion.

*3 Affirmed.

All Citations

Not Reported in N.W.2d, 2004 WL 1192123

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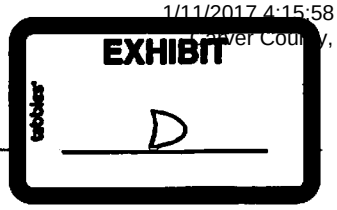

2006 WL 2348079
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

In re ESTATE OF Joseph Henry GOSNELL, III, a/k/a Joe Gosnell, Decedent.

No. A05-1879.
|
Aug. 15, 2006.

Synopsis
Background: Decedents's heirs-at-law appealed from order of the District Court, Washington County, allowing final account in probate of estate of decedent.

Holdings: The Court of Appeals, Minge, J., held that:

[1] trial court did not abuse its discretion when it denied request for additional discovery or evidentiary hearings regarding reasonableness of fees charged to estate, but

[2] it could not decide on appeal whether trial court correctly determined that fees charged by attorney and personal representative were fair and reasonable.

Reversed and remanded.

West Headnotes (2)

[1] Executors and Administrators
Counsel Fees and Costs
Executors and Administrators
Hearing by Court in General

Trial court did not abuse its discretion when it denied request of decedent's heirs-at-law for additional discovery or evidentiary hearings regarding reasonableness of fees charged to estate, in proceeding in which court allowed final account, settling, and distribution of estate; based on court's extensive experience with probate and issues involved in case, voluminous probate-court file, and detailed time records submitted by law firm handling estate, court could reasonably have determined that there was adequate record to rule on attorney and personal representative fees. M.S.A. §§ 524.3-719, 524.3-721, 525.515(b).

Cases that cite this headnote

[2] Executors and Administrators
Hearing by Court in General
Executors and Administrators
Review

Appellate court could not decide on appeal whether trial court correctly determined that fees charged by attorney and personal representative were fair and reasonable under legislative guidelines, in proceeding in which court allowed final account, settling, and distribution of estate; district court had not furnished memorandum or justification of findings, record lacked justification for finding of fair and reasonable attorney fees, and although trial court allowed fees when it approved final account and allowed payment of fees, without findings or analysis by trial court, meaningful review by appellate court was precluded. M.S.A. §§ 524.3-719(b), 525.515(b).

Cases that cite this headnote

Washington County District Court, File No. PX-00-400096.

Attorneys and Law Firms

Joseph F. Schmidt, Law Offices of Joseph F. Schmidt, Minneapolis, MN, for appellants.

Gerald G. Dederick, Robert L. Bach, Wendy M. Brekken, Felhaber, Larson, Fenlon & Vogt, P.A., Minneapolis,

MN, for respondent.

Ronald B. Sieloff, Eagan, MN, for Estate of Barbara Ann Gosnell, and Scott Wibbens and David Wibbens.

Considered and decided by RANDALL, Presiding Judge; WILLIS, Judge; MINGE, Judge.

UNPUBLISHED OPINION

MINGE, Judge.

*1 This is an appeal from an order allowing the final account in the probate of the estate of Joseph Gosnell. Gosnell's heirs-at-law challenge the award of more than $465,000 in attorney fees and more than $32,000 in personal-representative fees, arguing that the district court erred by (1) failing to allow discovery or grant an evidentiary hearing on the reasonableness of the claimed fees; (2) failing to make specific findings about the reasonableness of the fees under the factors listed in Minn.Stat. §§ 525.515, 524.3-717 (2004); and (3) failing to reduce allegedly excessive fees. We reverse and remand.

FACTS

Joseph H. Gosnell, III (Mr. Gosnell) and Barbara Ann Gosnell (Mrs. Gosnell) were married in 1996. Mr. Gosnell had no children. Mrs. Gosnell had two children from a previous marriage. Appellants are certain nephews, nieces, and other blood relatives of Mr. Gosnell. In October 1999, on the eve of a medical operation, Mr. Gosnell engaged George Knapp, a distant relative and an attorney, to quickly prepare a will. The will names Mrs. Gosnell as the sole beneficiary and contains a survivorship clause that requires the beneficiary to survive Mr. Gosnell by 90 days. No contingent beneficiaries were named in the will. Respondent Robert A. Erickson, a longtime friend of Mr. Gosnell, was named as the personal representative. Mr. Gosnell survived the surgery. Although attorney Knapp urged Mr. Gosnell to have his will redone to deal with various contingencies, Mr. Gosnell did not do so.

On February 23, 2000, Mr. and Mrs. Gosnell died in an automobile accident. The death certificates did not include a determination of survivorship between the couple. At the time of Mr. Gosnell's death, the assets in his estate were real estate, artwork, and a business.

Erikson, as the designated personal representative, retained the services of the Felhaber law firm to probate the estate of Mr. Gosnell (the estate). On April 17, 2000, Erickson filed a petition seeking formal probate of will and appointment of a personal representative. In the petition, Mr. Erickson renounced his right to the appointment and nominated Diane Hurley, a longtime friend and employee of Mr. Gosnell, as personal representative. After numerous objections and counter-nominations for the position of personal representative, the district court ultimately appointed Erickson as the personal representative.

Various parties filed more than 170 pleadings during the five years this probate matter was pending. In addition to the controversy regarding the personal representative, the district court heard arguments for summary judgment, dealt with numerous other motions, held a pre-trial hearing and approved a settlement of the litigation over who were the legal heirs, approved the sale of Mr. Gosnell's business, held a hearing and issued a legal opinion regarding the clarity of the will's language, and held hearings on other objections raised by appellants. Additionally, the district court ordered the estate to conduct an investigation into possible legal-malpractice claims against attorney Knapp for his drafting of Mr. Gosnell's will. Based on the results of the investigation, the estate did not pursue such a claim. Except for the appeal now before this court, the parties have settled their differences; none of the district court's rulings has been contested.

*2 Estate administration by the personal representative and legal counsel required oversight of estate- and income-tax preparation, sale of real estate in three states, sale of other assets including a highly valuable work of art, an investigation into the validity of a divorce Mr. Gosnell obtained in Mexico more than 30 years ago, and disposition of Mr. Gosnell's business. The attorneys reported that disposition of the business required determination of ownership, inventory, and financial status of the corporate entity. The corporate records were largely incomplete.

The total value of the estate was $1,911,347.51 including non-probate assets. The attorney fees claimed were $465,939.50 and the personal representative's claimed fees were $32,307.05. Detailed legal billing records showing time and expenses were filed. Appellants challenged the fees. The respondent is the personal representative.

On February 8, 2005, respondents filed a petition for the complete settlement of the estate and decree of distribution. Four days before the scheduled April 15, 2005 hearing, appellants objected to the attorney fees and personal representative fees in the final account. Oral argument was allowed. Numerous specific objections were made as to the number of attorneys assigned, the amount of time billed, and the nature of the work included in the law firm's records. The size of the bill compared to the size of the estate was also criticized. Appellants requested time for additional discovery and a further hearing. The district court issued an order allowing the final account, settling, and distribution of the estate. As a function of this order, the attorney fees were approved. The order included no findings of fact or memorandum supporting the fees or rejecting appellant's objections to the fees. Appellant's requests for additional discovery and a further hearing were not specifically addressed and implicitly denied. This appeal follows.

DECISION

I. Additional Discovery and Hearings

The first issue is whether the district court erred in denying appellants' request to conduct additional discovery and for an additional evidentiary hearing regarding the reasonableness of the fees charged to the estate. A district court "has wide discretion to issue discovery orders and, absent clear abuse of that discretion, normally its order with respect thereto will not be disturbed." *Sheika* v. *Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn.1990).

Appellants were entitled under law to challenge the reasonableness of the fees charged to the estate in the manner provided in Minn.Stat. § 524.3-721 (2006). Absent an agreement with the testator, the following factors are used to evaluate attorney fees:

(1) The time and labor required;

(2) The experience and knowledge of the attorney;

(3) The complexity and novelty of problems involved;

(4) The extent of the responsibilities assumed and the results obtained; and

*3 (5) The sufficiency of assets properly available to pay for the services.

Minn.Stat. § 525.515(b) (2006). Absent an agreement, the personal representative's fees are reviewed on the basis of factors (1), (3), and (4). *See* Minn.Stat. § 524.3-719 (2006). In making a determination of the reasonableness of the fees charged by the attorneys and the personal representative, the district court is given significant deference within the statutory framework.

[1] Here, the district court apparently felt that the written objections to the fees, responses to those objections, further submissions in support of the fees, and appellant's responses to those submissions provided enough information to decide the matter of reasonableness of fees without further discovery or evidentiary hearings. Based on the district court's extensive experience with this probate and the issues involved in this case, the voluminous probate-court file, and the detailed time records submitted by the law firm handling the estate, the district court could reasonably have determined that there was an adequate record to rule on the attorney and personal representative fees. Accordingly, we conclude that the district court did not abuse its discretion when it denied appellants' request for additional discovery or evidentiary hearings.

II. Lack of Specific Findings

The second issue is whether the district court erred in failing to provide specific findings regarding the reasonableness of the fees charged by the Felhaber law firm and the personal representative. The district court's award of a reasonable amount of attorney fees is a factual determination that will not be set aside unless clearly erroneous. *In re Estate of Balafas*, 302 Minn. 512, 516, 225 N.W.2d 539, 541 (1975). When the district court's findings are reasonably supported by the evidence, they are not clearly erroneous and must be affirmed. *Schweich* v. *Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn.1990). The legislature has identified specific factors previously set forth that the court is to consider in determining the reasonableness of personal representative and attorney fees. *See* Minn.Stat. § 524.3-719(b)(1-3); § 525.515(b)(1-5). However, the statutes do not require specific findings by the district court to support its approval of the disputed fees.

[2] Here, the probate court did not make specific findings of fact, and its order to allow the final account, settling and distribution of the estate's assets implicitly held that the attorney fees were fair and reasonable. Both parties discuss *In re Estate of Bush*, 304 Minn. 105, 230 N.W.2d 33 (1975), as providing an answer to whether this court may rely on the district court's order to impute a determination that the attorney fees charged to the estate

were reasonable. In *Bush,* the Minnesota Supreme Court relied on a number of factors to find that the district court's determination regarding the appropriateness of attorney fees was fair and reasonable. 304 Minn. at 123-24, 230 N.W.2d at 44-45. Important to the Court's analysis in *Bush* was the district court's memorandum accompanying its findings, which discussed 18 separate factors, and the district court's intimate knowledge of the case. 304 Minn. at 117-20, 230 N.W.2d at 40-42.

*4 Other decisions have concluded that the district court's determination of reasonableness comes directly from its findings of fact. *See Balafas,* 302 Minn. at 515, 225 N.W.2d 539 (laying out specific language that exhibited an intimate knowledge of the issues at hand); *In re Estate of Weisberg,* 242 Minn. 150, 153, 64 N.W.2d 370, 372 (1954) (affirming that consideration of the size of the total estate and the extent to which an estate is depleted by fees is appropriate in determining reasonableness). This court has looked to specific findings of the district courts in determining whether the finding of reasonableness was justified. *See In re Estate of Torgersen,* 711 N.W.2d 545, 555 (Minn.App.2006) (stating that "the district court did not reach the issue of good faith or reasonableness of the fees claimed. Therefore, we reverse ... and remand to the district court for a determination of whether appellant acted in good faith and, if so, for a determination of the reasonableness of the fees ...").

Respondents rely on *Edina Comm. Lutheran Church* v. *State* to support their assertion that a district court's findings will be upheld if they "permit meaningful appellate review." 673 N.W.2d 517, 523 (Minn.App.2004). But in *Edina Comm. Lutheran Church,* this court concluded: "[a]bsent findings, we do not know what the trial court concluded on the issues, and thus we cannot determine whether denial of [appellant's] motion constituted an abuse of discretion." *Id.*

The record in this matter is incomplete regarding the district court's rationale in determining that the attorney fees were fair and reasonable. Unlike *Bush* and *Edina Comm. Lutheran Church,* in this case the district court has not furnished a memorandum or justification of findings. Appellants point to the lack of a detailed memorandum as support for their contention that the district court abused its discretion in ordering attorney fees. Contrarily, respondents rely on the familiarity of the district court with the proceedings to justify the award of attorney fees without a memorandum to support the district court's decision. However, the record lacks a justification for a finding of fair and reasonable attorney fees. The only statement in the district court's order that remotely addresses the reasonableness of attorney fees is the cryptic sentence in the official probate form that reads: "The Final Account of the Personal Representative is allowed ."

The factors listed in Minn.Stat. §§ 525.515 and 524.3-719 seek to assure that fees are fair and reasonable. Here, the attorney fees are substantial compared to the size of the estate. Although the district court in this case allowed the fees when it approved the final account and allowed payment of the fees, without findings or analysis by the probate court, meaningful review by this court is precluded. We cannot decide whether it correctly determined that the fees charged by the attorney and the personal representative were fair and reasonable under the legislative guidelines.

*5 Accordingly, we do not reach the challenge to the amount of fees. We reverse and remand this matter for findings of fact and analysis of the fairness and reasonableness of the attorney and personal representative fees. Of course, the district court may in its discretion allow discovery and a hearing on the fees if it decides that would be helpful.

Reversed and remanded.

All Citations

Not Reported in N.W.2d, 2006 WL 2348079

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